Office - Supreme Court, U.S.
FILED
NOV 19 1981
ALEXANDER L. STEVAS, CLERK

No. 80-2178

In The Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, AND UNIVERSITY OF MARYLAND, PETITIONERS,

v.

JUAN CARLOS MORENO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

CHARLES A. GRADDICK
Attorney General of Alabama
State Administrative Building
Montgomery, Alabama 36130
(205) 834-5150

ROBERT K. CORBIN
Attorney General of Arizona
1700 West Washington
Phoenix, Arizona 85007
(602) 255-4266

WILSON L. CONDON
Attorney General of Alaska
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

JOHN STEVEN CLARK
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

(See inside front cover for additional counsel)

November 19, 1981

George Deukmejian
Attorney General of California
800 Tishman Bldg., 3580 Wilshire
Los Angeles, California 90010
(213) 736-2304

J. D. MacFarlane
Attorney General of Colorado
1525 Sherman Street — Third Floor
Denver, Colorado 80203
(303) 866-3611

Carl R. Ajello
Attorney General of Connecticut
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115
(203) 566-2026

Richard S. Gebelein
Attorney General of Delaware
820 North French Street, 8th Floor
Wilmington, Delaware 19801
(302) 571-3838

Jim Smith
Attorney General of Florida
State Capitol
Tallahassee, Florida 32304
(904) 487-1965

Arthur K. Bolton
Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

Tany S. Hong
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

David H. Leroy
Attorney General of Idaho
State House
Boise, Idaho 83720
(208) 334-2400

Tyrone C. Fahner
Attorney General of Illinois
500 South Second
Springfield, Illinois 62701
(217) 782-1090

Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

Thomas J. Miller
Attorney General of Iowa
Hoover Building — Second Floor
Des Moines, Iowa 50319
(515) 281-8373

Robert T. Stephan
Attorney General of Kansas
Judicial Center — Second Floor
Topeka, Kansas 66612
(913) 296-2215

Steven L. Beshear
Attorney General of Kentucky
State Capitol
Frankfort, Kentucky 40601
(502) 564-4002

William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112
(504) 568-5575

James E. Tierney
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

Francis X. Bellotti
Attorney General of Massachusetts
One Ashburton Place — 20th Floor
Boston, Massachusetts 02108
(617) 727-2200

Frank J. Kelley
Attorney General of Michigan
525 West Ottowa Street
Lansing, Michigan 48913
(517) 373-1110

Warren R. Spannaus
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155
(612) 296-6196

(See inside back cover for additional counsel)

TABLE OF CONTENTS

	PAGE
Interests of AMICI	1
Summary of Argument	3
Argument:	
I. The lower courts' erroneous conclusion that the University's in-state policy violates due process demonstrates why the irrebuttable presumption doctrine of *Vlandis v. Kline* should be rejected as a measure of government classifications	4
II. The lower courts erroneously concluded that granting a lower educational subsidy to non-immigrant aliens triggers strict equal protection scrutiny and constitutes impermissible state regulation of immigration	10
Conclusion	14

TABLE OF CITATIONS

Attorney General v. Waldron, 289 Md. 685, 426 A.2d 929 (1981)	6
Bishop v. Wood, 426 U.S. 341 (1976)	8
Board of Education, Levittown Union Free School District v. Nyquist, No. 2966E-80 (Sup. Ct. Oct. 26, 1981)	6
Dandridge v. Williams, 397 U.S. 471 (1970)	2, 7
deLaurier v. San Diego Unified School District, 588 F.2d 674 (9th Cir. 1978)	5
Elkins v. Moreno, 435 U.S. 647 (1978)	7, 9
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)	8
Fiallo v. Bell, 430 U.S. 787 (1977)	5
First National Bank v. Bellotti, 435 U.S. 765 (1978)	5

	PAGE
Foley v. Connelie, 435 U.S. 291 (1978)	14
Friedman v. Rogers, 440 U.S. 1 (1979)	5
Graham v. Richardson, 403 U.S. 365 (1971)	12
Knebel v. Hein, 429 U.S. 288 (1977)	5
Lochner v. New York, 198 U.S. 45 (1905)	5
Malmed v. Thornburgh, 621 F.2d 565 (3d Cir. 1980)	5, 8
Martin v. Bergland, 639 F.2d 647 (10th Cir. 1981)	5
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	5
McGinnis v. Royster, 410 U.S. 263 (1973)	3, 7, 10
McGowan v. Maryland, 366 U.S. 420 (1961)	3, 7
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	8, 14
Moreno v. University of Maryland, 645 F.2d 217 (4th Cir. 1981)	1, 13
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979)	5, 11, 13
Nyquist v. Mauclet, 432 U.S. 1 (1977)	12
Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)	5, 9
Sakol v. Commissioner, 574 F.2d 694 (2d Cir.), *cert. denied,* 439 U.S. 859 (1978)	5
Skafte v. Rorex, 430 U.S. 961 (1977) (*mem.*)	5
Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979)	5
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	3, 5, 7
Vance v. Bradley, 440 U.S. 93 (1979)	2
Vlandis v. Kline, 412 U.S. 441 (1973)	*passim*
Weinberger v. Salfi, 442 U.S. 749 (1975)	3, 4, 7

PAGE

Statutes

I.R.C. § 872 11

Maryland Annotated Code, Article 81, § 280 (1980) 11

Miscellaneous

Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup. Ct. Rev. 275 11

L. Tribe, American Constitutional Law § 16-31 (1978) 6

No. 80-2178

In The Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, AND UNIVERSITY OF MARYLAND, PETITIONERS,

v.

JUAN CARLOS MORENO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

INTERESTS OF AMICI

The interests of the amici curiae and our reasons for urging this Court to reverse the decision of the circuit court in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), are as follows:

The amici curiae are the other forty-nine (49) sovereign States that have joined Maryland to show their deep concern about the issues raised in this case and the impact their resolution will have on the constitutionality of the tuition policies of numerous public colleges and universities and on the constitutionality of many other State classifications. The unprecedented involvement here of every State in the Union is motivated by reasons transcending the financial cost to States of an adverse decision, although that would be enormous, and the importance of the case to public institutions of higher education, which cannot be minimized. Foremost is our interest in reasoned constitutional adjudication and the principles that should govern lower courts in their approach to resolving constitutional challenges to State statutes and policies. Thus, we stand with Maryland in this case.

As amici curiae, we steadfastly maintain that the irrebuttable presumption doctrine relied upon by the lower courts has outlived whatever utility it may have had and that this case is the appropriate vehicle to overrule *Vlandis v. Kline*, 412 U.S. 441 (1973). Since 1975, this Court has repeatedly rejected the invocation of the irrebuttable presumption doctrine. Most of the federal circuits have effectively declared the doctrine moribund or its remnants constitutionally unsound or redundant. Yet as long as *Vlandis* survives, there will be decisions like that of the Fourth Circuit which threaten to breathe new life into this disfavored analysis. In the area of equal protection, this Court has generally refused to impose a requirement that State classifications be perfect. *Vance v. Bradley*, 440 U.S. 93 (1979); *Dandridge v. Williams*, 397 U.S. 471 (1970). The time has come to lay to rest the due process equivalent of this discarded perfection standard — the "universally true" requirement of the irrebuttable presumption doctrine.

If the decision of the Fourth Circuit should stand, it will also have a deleterious effect on the rationally-based tuition policies of many public colleges and universities. In striking down the University of Maryland's policy of excluding nonimmigrant

aliens from in-state benefits, the court of appeals has not only invalidated a line drawn by most public colleges and universities in the United States, but it has also called into question the very rationale for the in-state/out-of-state distinction, *viz.*, that those classes which contribute the least to the cost of a public higher education should not be subsidized in the same fashion as those classes which make full contributions.

Finally, we contend that the lower court grievously mishandled the equal protection and supremacy clause issues. In holding unconstitutional the exclusion of nonimmigrant aliens from in-state benefits, the decision below improperly overextended the reach of suspect class equal protection analysis to a subclass of aliens bearing few of the burdens shared by citizens and permanent resident aliens and of the state "regulation of immigration" supremacy clause doctrine beyond any rationale articulated by this Court. If the decision below is allowed to stand, large numbers of nonimmigrant alien students who contribute little to the cost of a public education will be permitted to qualify for in-state benefits, with a resulting impact on the budgets of publicly-supported schools.[1]

SUMMARY OF ARGUMENT

VLANDIS v. KLINE SHOULD BE OVERRULED

Since 1975, this Court has rejected every invocation of the irrebuttable presumption doctrine and this due process analysis has been criticized by many of the federal circuits. In fact, the precise holding of *Vlandis v. Kline*, 412 U.S. 441 (1973), has not survived *Weinberger v. Salfi*, 442 U.S. 749 (1975), and *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Attempts to modify *Vlandis* to invalidate a conclusive presumption of a factor designated a "paramount" policy consideration conflict with *McGowan v. Maryland*, 366 U.S. 420 (1961), and *McGinnis v. Royster*, 410 U.S. 263 (1973).

[1] While we do not write separately on the point, we also align ourselves with the petitioners in urging that, in any event, the ordering of retroactive refunds in this case contravened the eleventh amendment.

Vlandis is inconsistent with any theory of procedural or substantive due process and the doctrine of irrebuttable presumptions as presently formulated does not insure the rationality of classifications — the only legitimate judicial inquiry. Finally, the applications of the irrebuttable presumption doctrine is particularly irrational in the present case where a finding of constitutionality turned on the issuance of a University resolution which changed neither the language nor the operation of its policy of denying in-state benefits to nonimmigrants.

THE UNIVERSITY OF MARYLAND'S IN-STATE POLICY DOES NOT VIOLATE THE EQUAL PROTECTION OR SUPREMACY CLAUSES.

It is perfectly rational to accord in-state benefits to citizens and permanent resident aliens but not nonimmigrants because the latter class is accorded an income tax advantage and thus contributes less to the economy of the State and the operation of the University of Maryland (which is supported primarily by income tax revenues). Supreme Court cases applying strict scrutiny to alien classifications have all involved "resident aliens," not nonimmigrants. Finally, because it does not deny a necessity of life to resident aliens, the University of Maryland's in-state policy does not constitute a regulation of immigration.

ARGUMENT

I.

THE LOWER COURTS' ERRONEOUS CONCLUSION THAT THE UNIVERSITY'S IN-STATE POLICY VIOLATES DUE PROCESS DEMONSTRATES WHY THE IRREBUTTABLE PRESUMPTION DOCTRINE OF *VLANDIS v. KLINE* SHOULD BE REJECTED AS A MEASURE OF GOVERNMENT CLASSIFICATIONS.

Ever since *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), proclaimed the irrebuttable presumption analysis of *Vlandis v. Kline*, 412 U.S. 441 (1973), "a virtual engine of destruction for countless legislative judgments," this Court has declined every

invitation to apply the doctrine to invalidate rationally-based classifications not affecting fundamental liberties or even to suggest its possible relevance to what might have formerly been considered applicable situations. *See New York City Transit Authority v. Beazer,* 440 U.S. 568, 592 n.38 (1979); *Friedman v. Rogers,* 440 U.S. 1, 7 n.8 (1979); *Vance v. Bradley,* 440 U.S. 93 (1979); *First National Bank v. Bellotti,* 435 U.S. 765, 772-74 1978); *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 490 n.18 (1977); *Skafte v. Rorex,* 430 U.S. 961 (1977) (*mem.); Fiallo v. Bell,* 430 U.S. 787, 791 (1977); *Knebel v. Hein,* 429 U.S. 288, 297 (1977); *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 22-24 (1976); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976).

With the notable exception of the Fourth Circuit, the United States Courts of Appeals have declined to employ the doctrine as a separate analysis, and a number of courts have gone out of their way to criticize irrebuttable presumptions and to declare the doctrine moribund. *See, e.g., Sakol v. Commissioner,* 574 F.2d 694, 698 n.10 (2d Cir.), *cert. denied,* 439 U.S. 859 (1978) (cases cited with approval in *Vlandis* are " 'plainly not good law today' "); *Malmed v. Thornburgh,* 621 F.2d 565, 575-76 (3d Cir. 1980) ("As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant 'Lochner-ism,' *see Lochner v. New York,* 198 U.S. 45 . . . (1905), a concept that has been administered suitable last rites and mercifully interred."); *Trafelet v. Thompson,* 594 F.2d 623, 630 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (if classification is rationally related to legitimate state purpose and thus not violative of equal protection, it does not create an irrebuttable presumption); *deLaurier v. San Diego Unified School District,* 588 F.2d 674, 683 n.16 (9th Cir. 1978); *Martin v. Bergland,* 639 F.2d 647, 659 n.12 (10th Cir. 1981) ("For purposes of this

case, we read *Usery and Salfi* as an indication that the [irrebuttable presumption] doctrine is moribund.")[2]

Although this impressive authority should have signaled the end for irrebuttable presumptions, there are courts like the Fourth Circuit that will continue to rely upon *Vlandis v. Kline* until it is overruled. In fact, among some courts, *Vlandis* has been reincarnated to justify a middle tier equal protection scrutiny of economic and social welfare classifications. *See Attorney General v. Waldron*, 289 Md. 685, 426 A.2d 929 945 (1981) (invalidating state statute preventing retired judge who receives pension from practicing law); *Board of Education, Levittown Union Free School District v. Nyquist*, No. 2966E-80, slip opinion at 22 (N.Y. Sup. Ct. Oct. 26, 1981) (striking down New York's system of public school finance); Tribe, *American Constitutional Law* § 16-31, at 1090 (1978).[3]

There are a host of reasons why lower courts should no longer be permitted to invoke *Vlandis* to justify attacks on rational state classifications.

First, *Vlandis* is utterly inconsistent with subsequent decisions of this Court. The 1973 case involved a challenge to a State residency classification that would have been sustained under traditional equal protection principles. The statute did not disadvantage a suspect class or impact on a fundamental right,

---

[2] Even the Fourth Circuit, between its two summary affirmatives in the present case, said:

> The doctrine of impermissible irrebuttable or conclusive presumption has been justly criticized as of doubtful constitutional antecedents and of limited application.

Fairfax Hospital Association, Inc. v. Califano, 585 F.2d 602, 608 (4th Cir. 1978).

[3] It is also noteworthy that courts that continue to rely on *Vlandis* do so without in any way suggesting that it has been, at the very least, modified by Weinberger v. Salfi, 422 U.S. 749 (1975). *Compare* Pentco, Inc. v. Moody, 474 F. Supp. 1001, 1005-06 (S.D. Ohio 1978) *and* Molyneaux v. Pennsylvania Department of Public Welfare, 403 A.2d 634 (Pa. Commonw. Ct. 1979) *with* Elkins v. Moreno, 435 U.S. 647, 660 (1978).

and the majority conceded at least one rational basis for the classification. 412 U.S. at 451. Thus, although found to violate due process as an irrebuttable presumption, it did not violate equal protection. *See Dandridge v. Williams*, 397 U.S. 471 (1970). More recent cases of this Court, however, indicate that once the constitutionality of a classification is sustained against an equal protection attack, it will also survive an irrebuttable presumption due process challenge. *See Weinberger v. Salfi*, 422 U.S. at 769-70; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24 (1976) (irrebuttable presumption not violative of due process "when its operation and effect are clearly permissible"). *See* also cases cited *supra* at 5.[4] Thus, under presently applicable principles, the statute in *Vlandis* would be upheld and the holding of that case is no longer good law.[5]

Second, any attempt to salvage a portion of *Vlandis* or a *modified* irrebuttable presumption doctrine would similarly break apart on the strength of more persuasive cases. *Salfi* describes *Vlandis* as a situation where the State statute "purported" to speak in terms of one factor but then made evidence relating to that factor inadmissible. *Weinberger v. Salfi*, 422 U.S. at 772. And *Elkins v. Moreno*, 435 U.S. 647, 660 (1978), said that *Vlandis* as limited by *Salfi* applied when the State makes a factor, such as domicile, its "paramount policy

[4] In the past, the line between denial of equal protection and an impermissible irrebuttable presumption has sometimes been hard to decipher and this Court has cited equal protection cases in finding an irrebuttable presumption and vice versa. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965), cited in Vlandis v. Kline, 412 U.S. at 447 n.4. *See also* United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973), an irrebuttable presumption case cited as an equal protection one in U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 n.10 (1980); and Jiminez v. Weinberger, 417 U.S. 628 (1974), an equal protection case cited as an irrebuttable presumption case in Justice Brennan's dissent in Weinberger v. Salfi, 422 U.S. at 802-04.

[5] As noted in Tribe, *American Constitutional Law* § 16-32 at 1095 n.25, the difficulty of reconciling *Vlandis*, *Usery*, and *Salfi* "should not be underestimated." See also the dissenting opinion of Justice Brennan in *Salfi*, which argued that the majority opinion and *Vlandis* could not co-exist. Weinberger v. Salfi, 422 U.S. at 802-03.

consideration," yet conclusively presumes that a person is unable to meet that test. However, social welfare classifications such as those at issue in *Vlandis* and *Moreno* will pass muster under equal protection if any state of facts *reasonably may be conceived* to justify them, regardless of what they purport to do. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). And in *McGinnis v. Royster*, 410 U.S. 263, 276 (1973), an equal protection case, this Court said that "our decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which is subordinate." Clearly, if by surviving an equal protection challenge a classification satisfies the requirements of the due process clause (as this Court's cases indicate), it is hard to fathom what purpose is still served by the irrebuttable presumption doctrine, no matter how it is modified.

Third, *Vlandis* with its language of strict scrutiny, 412 U.S. at 451, and even as modified, still cannot be squared with any prevailing theory of equal protection or due process. As noted above, application of traditional equal protection analysis to a *Vlandis*-type classification would result in a finding of constitutionality. Moreover, *Vlandis* was clearly not a procedural due process case and could not be justified on such a basis. The Connecticut in-state tuition scheme challenged created no "property" interest for out-of-state students. *Bishop v. Wood*, 426 U.S. 341 (1976).[6] And certainly the statute could not be said to create a "liberty" interest deserving of due process protection. *Cf. Memorial Hospital v. Maricopa County*, 415 U.S. 250, 260 n.15 (1974) (in-state tuition does not constitute one of the "necessities of life"). Nor can the decision in *Vlandis* be justified on any substantive due process theory which, in the absence of an impact on fundamental rights, requires only a rational basis. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978). *See also Malmed v. Thornburgh*, 621 F.2d 565, 575-76 (3d Cir. 1980).

[6] Indeed, the only possible *source* of a property right — the statute — denied its benefits to students it defined as out-of-staters.

Fourth, the irrebuttable presumption doctrine, as presently formulated, makes little sense and serves only as a trap for the incautious pleader. In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977), this Court held that if a State policy serves any purpose other than the measure of an irrebuttable fact, implication of an irrebuttable presumption fails. In *Elkins*, this doctrine was apparently restated to suggest that the "other purpose" must be argued as the paramount State interest rather than as a subsidiary one. 435 U.S. at 660. Nevertheless, neither formulation would appear to require the rationality of any purpose proffered. If the irrebuttable presumption doctrine means what these cases suggest, it would merely encourage legislators and policy makers to pay lip service to alternative rationales or their counsel to plead as many statutory or regulatory purposes as conceivable. It would not foster or enhance the rationality of any measure, which should be the only focus of the courts in any event.

Moreover, the decision below, by finding an irrebuttable presumption in the University's in-state policy prior to 1978 but not after, simply on the basis of a University resolution reaffirming interests asserted throughout the litigation, defies reason. The resolution neither altered the terms of the in-state policy nor removed its exclusion of nonimmigrants from benefits. To draw a constitutional difference on the basis of such an assertion of interests reduces the irrebuttable presumption doctrine to one not worth saving.[7]

[7] It is noteworthy that the cost equalization rationale allegedly made "paramount" in the 1978 resolution was present in the case from its inception. Moreno v. Toll, 480 F. Supp. 1116, 1123-24 (D. Md. 1979); Moreno v. University of Maryland, 420 F. Supp. 541, 560 (D. Md. 1976). Indeed, reasonable minds would think that cost-equalization is the *raison d'etre* of any in-state policy.

The district court erroneously and expressly rejected cost-equalization as an alternative rationale for the University's policy in 1976 on the obvious ground that *Vlandis* in its unvarnished state — without modification by *Salfi* — controlled the outcome. 420 F. Supp. at 560. It is hard to believe that the Constitution should punish the University of Maryland simply because the trial judge was unaware of

In this case, the Court of Appeals for the Fourth Circuit invalidated a rationally-based State policy by impermissibly picking and choosing between primary and secondary rationales for a governmental classification. *See McGinnis v. Royster,* 410 U.S. 263, 276 (1973) ("So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying."). Although there may indeed be ways for this Court to reverse that decision without overruling *Vlandis,*[8] it is hard to imagine a case better than the present one to demonstrate the intellectual failings of the irrebuttable presumption doctrine. For this reason, we urge the Court to set aside the decision of the Fourth Circuit and, in so doing, to overrule *Vlandis v. Kline.*

II.

THE LOWER COURTS ERRONEOUSLY CONCLUDED THAT GRANTING A LOWER EDUCATIONAL SUBSIDY TO NONIMMIGRANT ALIENS TRIGGERS STRICT EQUAL PROTECTION SCRUTINY AND CONSTITUTES IMPERMISSIBLE STATE REGULATION OF IMMIGRATION.

Most public colleges and universities in the United States confer eligibility for in-state benefits on citizens and permanent resident aliens but deny such preferential treatment to nonimmigrant aliens. Because of the large numbers of resident aliens who qualify, such a policy cannot be laid to an anti-alien

Salfi — anymore than it makes constitutional sense to punish the University because it may have erroneously construed the Maryland law of domicile, particularly when its in-state policy is otherwise rationally based.

[8] The petitioners contend that this Court's decision in Toll v. Moreno, 441 U.S. 458 (1979), should have removed the irrebuttable presumption issue from the case. In addition, if the University is successful in winning reversal on equal protection grounds, this Court could reject any implication of an irrebuttable presumption on the basis of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 24 (1976) (regulation in terms of an irrebuttable presumption not invalidated "when its operation and effect are clearly permissible"). Finally, they urge that *Vlandis* might be reinterpreted and distinguished as a case involving an irrational residency requirement. *See* Sosna v. Iowa, 419 U.S. 393, 409 (1975); Vlandis v. Kline, 412 U.S. at 456-59.

animus. *See New York City Transit Authority v. Beazer*, 440 U.S. at 592-93. Rather, it has its basis in the recognition of the very real differences that exist between nonimmigrants and citizens and permanent resident aliens (immigrants), most importantly, with respect to the burdens shared and the contributions made by each class.

As one scholar has noted:

> Immigrant aliens are admitted to the United States with the expectation that they will remain here indefinitely and will eventually become citizens. Nonimmigrants, by contrast, cannot have an intention of remaining here indefinitely, since they are admitted for a limited purpose and for a limited period of time. They do not share all the burdens that are imposed on residents of the country. In many respects their position is similar to that of nonresident citizens who are temporarily present in the State. It may be perfectly rational to deny them benefits that are made available to the State's permanent residents.

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. One of the burdens shared by citizens and permanent resident aliens and avoided by nonimmigrants generally is full contribution by way of tax dollars to State programs and services such as the cost of a public higher education.

It is the State's income tax that is the primary source of revenue for the operation of the University of Maryland. Yet it is clear that *all* nonimmigrants are treated more advantageously than citizens and resident aliens with respect to the payment of State income taxes. Many are spared the tax placed on the worldwide income of citizens and resident aliens. *See* I.R.C. § 872 and Md. Ann. Code art. 81, § 280(a) (1980). Numerous other nonimmigrants, particularly those unable to work, are not within the State long enough to lend tax support to the cost of a public higher education. Some nonimmigrants, like the parents of the respondents, are exempt from State income tax on their

international bank salaries. Although the basis for their individual income tax advantage may vary, it is nevertheless clear that all nonimmigrants, including the subclass represented by the international bank students, are accorded an income tax advantage over citizen and permanent resident aliens and thus contribute less to the costs of operating the University of Maryland.

In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), the Court said that a State could not rely upon a justification of limiting expenditures with respect to "tax revenues to which aliens have contributed on an equal basis with the residents of the State." Similarly, in *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), the Court said that a State could not discriminate against resident aliens, who "are obligated to pay their full share of the taxes that support the assistance programs." The converse of these propositions is true — where an alien subclass (not including permanent resident aliens) has not contributed on an equal basis to tax revenues and does not pay its full share of taxes that support educational programs, justifications of limiting expenditures and equalizing the costs of education with respect to tax contributions are constitutionally permissible interests.

The international bank students contend that they are in fact "resident aliens" within the meaning of this Court's cases requiring strict scrutiny of certain classifications disadvantaging resident aliens; that the class disadvantaged by the University's policy consists only of nonimmigrants capable of acquiring domicile, not all nonimmigrants; and that they do pay certain State taxes. All of these arguments miss the mark.

The term "resident alien" as used in *Graham* and *Mauclet* means permanent resident aliens not nonimmigrants, many of whom do not remain long in this country and all of whom do not serve in the armed forces and pay their full share of taxes. *See Graham v. Richardson*, 403 U.S. 365, 376 (1971); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977). Moreover, it is clear that the

lower court struck down the University's policy as applied to all nonimmigrants — because that is precisely what it said it did. *See Moreno v. University of Maryland,* 645 F.2d 217, 220 (4th Cir. 1981) (concluding that the district court applied "strict scrutiny to the suspect classification of nonimmigrant aliens").

In any event, the respondents benefit little by attempting to redefine and narrow the class because the University's tax contribution/cost equalization rationale is even more compelling as applied to a tax privileged group seeking "more precise special rules for that special class." *New York City Transit Authority v. Beazer,* 440 U.S. at 589.[9] Finally, by suggesting that they may pay some sales and property taxes to the State, the students do little to advance their position because, in the main, it is the income tax that supports the University of Maryland.

In summary, the exclusion of nonimmigrant aliens from in-state benefits does not affect a suspect class and is rationally justified by the principle of cost equalization. Thus, the University's policy is not violative of equal protection.

As handled by the lower courts, the supremacy clause issue rises or falls with the outcome of the equal protection question. *See Moreno v. University of Maryland,* 645 F.2d at 220. Thus, if this Court sustains the University's policy under the fourteenth amendment, it should automatically reject the lower courts' decisions on the supremacy clause issue. In any event, there is simply no basis for finding here an impermissible State attempt to regulate immigration, because that preemption

[9] Moreover, it is no answer to say that the elusive concept of domicile will limit the number of nonimmigrants who can qualify for in-state tuition. In Elkins v. Moreno, 435 U.S. 647 (1978), this Court ultimately left it to State courts to determine whether State law precluded the establishment of domicile for the category of nonimmigrants in question. And, it would appear that most State courts do not consider nonimmigrants' visa restrictions as barring the establishment of domicile. *See* Annot., *What Constitutes Residence or Domicile Within State by Citizens of Another Country for Purpose of Jurisdiction in Divorce,* 51 A.L.R. 3d 223, 233-35 (1973).

doctrine has no application to the denial of a State benefit that is not a necessity of life. *Foley v. Connelie*, 435 U.S. 291, 295 (1978). Clearly, in-state tuition does not fall into that category. *Memorial Hospital v. Maricopa County*, *415 U.S.* at 260 n.15.

CONCLUSION

The decisions of the lower courts represent a fundamental misreading of constitutional law. They dangerously overextend the suspect class and supremacy clause doctrines and attempt to resurrect the discarded irrebuttable presumption analysis. For all of these reasons, we urge as amici curiae that the Court reverse the judgments below and overrule *Vlandis v. Kline*.

Respectfully submitted,

STATE OF ALABAMA
CHARLES A. GRADDICK
Attorney General
State Administrative Building
Montgomery, Alabama 36130

STATE OF ALASKA
WILSON L. CONDON
Attorney General
Pouch K, State Capitol
Juneau, Alaska 99811

STATE OF ARIZONA
ROBERT K. CORBIN
Attorney General
1700 West Washington
Phoenix, Arizona 85007

STATE OF ARKANSAS
JOHN STEVEN CLARK
Attorney General
Justice Building
Little Rock, Arkansas 72201

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN
Attorney General
800 Tishman Bldg., 3850 Wilshire
Los Angeles, California 90010

STATE OF COLORADO
J. D. MACFARLANE
Attorney General
1525 Sherman Street — Third Floor
Denver, Colorado 80203

STATE OF CONNECTICUT
CARL R. AJELLO
Attorney General
Capitol Annex, 30 Trinity Street
Hartford, Connecticut 06115

STATE OF DELAWARE
RICHARD S. GEBELEIN
Attorney General
820 North French Street, 8th Floor
Wilmington, Delaware 19801

STATE OF FLORIDA
JIM SMITH
Attorney General
State Capitol
Tallahassee, Florida 32304

STATE OF GEORGIA
ARTHUR K. BOLTON
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

STATE OF HAWAII
TANY S. HONG
Attorney General
State Capitol
Honolulu, Hawaii 96813

STATE OF IDAHO
DAVID H. LEROY
Attorney General
State House
Boise, Idaho 83720

STATE OF ILLINOIS
TYRONE C. FAHNER
Attorney General
500 South Second
Springfield, Illinois 62701

STATE OF INDIANA
LINLEY E. PEARSON
Attorney General
219 State House
Indianapolis, Indiana 46204

STATE OF IOWA
THOMAS J. MILLER
Attorney General
Hoover Building — Second Floor
Des Moines, Iowa 50319

STATE OF KANSAS
ROBERT T. STEPHAN
Attorney General
Judicial Center — Second Floor
Topeka, Kansas 66612

COMMONWEALTH OF KENTUCKY
STEVEN L. BESHEAR
Attorney General
State Capitol
Frankfort, Kentucky 40601

STATE OF LOUISIANA
WILLIAM J. GUSTE, JR.
Attorney General
2-3-4 Loyola Avenue
New Orleans, Louisiana 70112

STATE OF MAINE
JAMES E. TIERNEY
Attorney General
State House
Augusta, Maine 04330

COMMONWEALTH OF MASSACHUSETTS
FRANCIS X. BELLOTTI
Attorney General
One Ashburton Place — 20th Floor
Boston, Massachusetts 02108

STATE OF MICHIGAN
FRANK J. KELLEY
Attorney General
525 West Ottawa Street
Lansing, Michigan 48913

STATE OF MINNESOTA
WARREN R. SPANNAUS
Attorney General
102 State Capitol
St. Paul, Minnesota 55155

STATE OF MISSISSIPPI
WILLIAM A. ALLAIN
Attorney General
Carroll Gartin Justice Building
P.O. Box 220
Jackson, Mississippi 39205

STATE OF MISSOURI
JOHN D. ASHCROFT
Attorney General
P.O. Box 899
Jefferson City, Missouri 65102

STATE OF MONTANA
MICHAEL T. GREELY
Attorney General
State Capitol
Helena, Montana 59601

STATE OF NEBRASKA
PAUL L. DOUGLAS
Attorney General
State Captiol
Lincoln, Nebraska 68509

STATE OF NEVADA
RICHARD H. BRYAN
Attorney General
Heroes Memorial Building,
Capitol Complex
Carson City, Nevada 89710

STATE OF NEW HAMPSHIRE
GREGORY H. SMITH
Attorney General
20 State House Annex
Concord, New Hampshire 03301

STATE OF NEW JERSEY
JAMES R. ZAZZALI
Attorney General
State House Annex, Second Floor
Trenton, New Jersey 08625

STATE OF NEW MEXICO
JEFF BINGAMAN
Attorney General
Bataan Building, P.O. Box 1508
Sante Fe, New Mexico 87501

STATE OF NEW YORK
ROBERT ABRAMS
Attorney General
Two World Trade Center
New York, New York 10047

STATE OF NORTH CAROLINA
RUFUS L. EDMISTEN
Attorney General
Department of Justice, P.O. Box 629
Raleigh, North Carolina 27602

STATE OF NORTH DAKOTA
ROBERT WEFALD
Attorney General
State Capitol
Bismarck, North Dakota 58505

STATE OF OHIO
WILLIAM J. BROWN
Attorney General
State Office Tower, 30 E. Broad St.
Columbus, Ohio 43215

STATE OF OKLAHOMA
JAN ERIC CARTWRIGHT
Attorney General
112 State Capitol
Oklahoma City, Oklahoma 73105

STATE OF OREGON
DAVE FROHNMAYER
Attorney General
100 State Office Building
Salem, Oregon 97310

COMMONWEALTH OF PENNSYLVANIA
LEROY S. ZIMMERMAN
Attorney General
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120

STATE OF RHODE ISLAND
DENNIS J. ROBERTS II
Attorney General
72 Pine Street
Providence, Rhode Island 02903

STATE OF SOUTH CAROLINA
DANIEL R. MCLEOD
Attorney General
Wade Hampton Office Building
Columbia, South Carolina 29211

STATE OF SOUTH DAKOTA
MARK V. MEIERHENRY
Attorney General
State Capitol Building
Pierre, South Dakota 57501

STATE OF TENNESSEE
WILLIAM J. LEECH, JR.
Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

STATE OF TEXAS
MARK WHITE
Attorney General
Capitol Station, P.O. Box 12548
Austin, Texas 78711

STATE OF UTAH
DAVID L. WILKINSON
Attorney General
236 State Capitol
Salt Lake City, Utah 84114

STATE OF VERMONT
JOHN J. EASTON
Attorney General
Pavillion Office Building
Montpelier, Vermont 05602

COMMONWEALTH OF VIRGINIA
J. MARSHALL COLEMAN
Attorney General
Supreme Court Building
Richmond, Virginia 23219

STATE OF WASHINGTON
KENNETH O. EIKENBERRY
Attorney General
Temple of Justice
Olympia, Washington 98504

STATE OF WEST VIRGINIA
CHAUNCEY H. BROWNING
Attorney General
State Capitol
Charleston, West Virginia 25305

STATE OF WISCONSIN
BRONSON C. LAFOLLETTE
Attorney General
114 East, State Capitol
Madison, Wisconsin 53702

STATE OF WYOMING
STEVEN FREUDENTHAL
Attorney General
123 State Capitol
Cheyenne, Wyoming 82002

November 19, 1981

William A. Allain
Attorney General of Mississippi
Carroll Gartin Justice Building
P.O. Box 220
Jackson, Mississippi 39205
(601) 354-7130

John D. Ashcroft
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Michael T. Greely
Attorney General of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

Paul L. Douglas
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Richard H. Bryan
Attorney General of Nevada
Heroes Memorial Building,
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

Gregory H. Smith
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3655

James R. Zazzali
Attorney General of New Jersey
State House Annex, Second Floor
Trenton, New Jersey 08625
(609) 292-4925

Jeff Bingaman
Attorney General of New Mexico
Bataan Building, P.O. Box 1508
Sante Fe, New Mexico 87501
(505) 982-6000

Robert Abrams
Attorney General of New York
Two World Trade Center
New York, New York 10047
(212) 488-3313

Rufus L. Edmisten
Attorney General of North Carolina
Department of Justice, P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-3377

Robert Wefald
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

William J. Brown
Attorney General of Ohio
State Office Tower, 30 E. Broad St.
Columbus, Ohio 43215
(614) 466-3376

Jan Eric Cartwright
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

Dave Frohnmayer
Attorney General of Oregon
100 State Office Building
Salem, Oregon 97310
(503) 378-6368

LeRoy S. Zimmerman
Attorney General of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

Dennis J. Roberts II
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

Daniel R. McLeod
Attorney General of South Carolina
Wade Hampton Office Building
Columbia, South Carolina 29211
(803) 758-3970

Mark V. Meierhenry
Attorney General of South Dakota
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

(See back cover for additional counsel)

WILLIAM J. LEECH, JR.
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

MARK WHITE
Attorney General of Texas
Capitol Station, P.O. Box 12548
Austin, Texas 78711
(512) 475-2501

DAVID L. WILKINSON
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 533-7661

JOHN J. EASTON
Attorney General of Vermont
Pavillion Office Building
Montpelier, Vermont 05602
(802) 828-3171

J. MARSHALL COLEMAN
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219
(804) 786-2071

KENNETH O. EIKENBERRY
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504
(206) 753-2550

CHAUNCEY H. BROWNING
Attorney General of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

BRONSON C. LAFOLLETTE
Attorney General of Wisconsin
114 East, State Capitol
Madison, Wisconsin 53702
(608) 266-1221

STEVEN FREUDENTHAL
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841